



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2004

Ms. Nellie G. Hooper
Fanning, Harper & Martinson, P.C.
4849 Greenville Avenue, Suite 1300
Dallas, Texas 75206

OR2004-8296

Dear Ms. Hooper:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 209973.

The Johnson County Sheriff's Office (the "sheriff"), which you represent, received a request for twenty-six categories of information pertaining to the death of a named inmate. You state that you have released some of the requested information to the requestor. You also state that you do not have information responsive to portions of the request.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹ We note that the Public Information Act (the "Act") does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request for information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.-San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). A governmental body must make a good faith effort to relate a request for information to any responsive information that is within its custody or control. See Open Records Decision No. 561 at 8-9 (1990).

² Although you raise section 552.107, you did not submit to this office written comments stating the reasons why section 552.107 would allow the information to be withheld. Thus, we find that you have waived this exception. See Gov't Code §§ 552.301, .302. Additionally, we note that while you claim that the requested information is also excepted under section 552.023, this provision does not constitute an exception to disclosure. Rather, section 552.023 addresses an individual's special right of access to information that is otherwise confidential. See Gov't Code § 552.023.

We begin by noting that the sheriff has not submitted the requested 911 tapes to our office for review. *See* Gov't Code § 552.301(e) (within fifteen business days of receiving written request for information, governmental body must submit to this office copies of specific information at issue, or representative samples). Therefore, this information is presumed to be public and must be released unless a compelling reason exists to withhold it. *See* Gov't Code §§ 552.301(e), .302. A compelling reason exists to withhold information when the information is confidential by law or where third party interests are at stake. Open Records Decision No. 150 (1977). Although the sheriff claims that the requested information is excepted from disclosure pursuant to section 552.103 of the Government Code, this section is a discretionary exception under the Act that does not constitute a compelling reason sufficient to overcome the presumption that the information at issue is public. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under Act can be waived). Thus, the sheriff may not withhold the requested 911 tapes under section 552.103 of the Government Code. Furthermore, because you have not submitted the videotapes for our review, we have no basis for determining whether a compelling reason exists for withholding such information under your remaining claims. Thus, we have no choice but to order 911 tapes released in accordance with section 552.302 of the Government Code.

Next, we note that the submitted information includes an arrest warrant. Article 15.26 of the Code of Criminal Procedure provides:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Crim Proc. Code art. 15.26. This provision makes the submitted arrest warrant expressly public. The exceptions found in the Act do not, as a general rule, apply to information that is made public by other statutes. *See* Open Records Decision No. 525 (1989) (statutory predecessor). Therefore, the sheriff must release the marked arrest warrant to the requestor.

Additionally, the submitted information contains a custodial death report. In Open Records Decision No. 521 (1989), this office addressed the confidentiality of custodial death reports and their attachments. We concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the Office of the Attorney General, Part I of a custodial death report filed with this office is public information, but Parts II through V of the report, including any attachments, are confidential. *See* Open Records Decision No. 521 at 4-5; *see also* Crim. Proc. Code art. 49.18(b) (attorney general shall make report,

with exception of any portion of report that attorney general determines is privileged, available to any interested person). The sheriff must release Part I of the submitted custodial death report as information that is made public by statute. *See* Open Records Decision No. 525 (1989) (exceptions found in statutory predecessor to Act not applicable to information made public by other statutes). The rest of the report, including any attachments, is confidential and must be withheld under section 552.101.

The submitted information also includes fingerprint information that is subject to sections 560.001, 560.002, and 560.003 of the Government Code. These sections provide as follows:

Sec. 560.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code § 560.001-.003. The submitted fingerprint information is confidential under section 560.003. However, the requestor is an attorney representing the family and the estate of the deceased individual. Therefore, the requestor has a special right of access to the fingerprints. *See id.* § 560.002(1).

Next, we note that some of the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

[w]ithout limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body; except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes completed reports made of, for, or by the sheriff, which must be released pursuant to section 552.022(a)(1), unless they are excepted from disclosure under section 552.108 or are expressly confidential under other law.³ Although the sheriff claims that the completed reports are excepted from disclosure under section 552.103, we note that this exception is a discretionary exception to disclosure that does not constitute "other law" for the purposes of section 552.022.⁴ Accordingly, we conclude that the sheriff may not withhold any portion of the completed reports under section 552.103 of the Government Code. However, since the sheriff also claims that the completed reports are excepted from disclosure under sections 552.101 and 552.130 of the Government Code, we will address these claims with regard to this particular information.

³ The sheriff does not claim that any portion of information that is subject to section 552.022 is excepted from disclosure under section 552.108 of the Government Code.

⁴ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information made confidential by other statutes. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). A portion of the section 552.022 information consists of working papers used or developed in an investigation under chapter 261. Because you have not cited any specific rule that the sheriff has adopted with regard to the release of this type of information, we assume that no such regulation exists. Given that assumption, the section 552.022 information we have marked is confidential pursuant to section 261.201 of the Family Code and must be withheld under section 552.101 of the Government Code. *See* Open Records Decision No. 440 at 2 (1986) (construing predecessor statute).

You also raise section 552.101 in conjunction with state and federal law governing the public availability of criminal history record information ("CHRI"). CHRI "means information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions" but does not include "driving record information maintained by [the Department of Public Safety ("DPS")] under Subchapter C, Chapter 521, Transportation Code." Gov't Code § 411.082(2).

Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Under chapter 411 of the Government Code, a criminal justice agency may obtain CHRI from DPS or from another criminal justice agency. *Id.* §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI

obtained from other criminal justice agencies). We note that section 411.083 does not distinguish between the CHRI of a person who is living and one who has died. Therefore, the sheriff must withhold any CHRI that you have in your possession that falls within the ambit of these state and federal regulations.

The remaining section 552.022 information contains a social security number. You claim that social security numbers must be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We note, however, that the laws making social security numbers and related records confidential are designed to protect an individual's privacy interests, and the privacy rights of an individual lapse upon death. *See Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref'd n.r.e.). Accordingly, the deceased individual's social security number may not be withheld under section 552.101 on the basis of the federal law.

You also claim that a portion of the remaining section 552.022 information is protected under section 552.130 of the Government Code. This section excepts from disclosure "information [that] relates to. . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." This provision was also enacted to protect the privacy of an individual, and therefore, the protection extinguishes at the individual's death. *See Moore*, 589 S.W.2d at 491. Therefore, the deceased individual's drivers license and motor vehicle information contained in the section 552.022 information may not be withheld under section 552.130. The remaining section 552.022 information must be released to the requestor.

We now address your claims under section 552.103 for the remaining submitted information not subject to section 552.022. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. See *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

In order to establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Texas Civil Practice & Remedies Code, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

You assert that the sheriff reasonably anticipates litigation relating to the subject of the present request. You inform us and provide documentation showing that, prior to the date the sheriff received this request for information, Johnson County received a notice of claim letter for damages. The notice of claim letter alleges negligence on the part of the sheriff for the death of the named inmate. Having reviewed the claim letter and your arguments, we conclude, based on the totality of the circumstances, that litigation was reasonably anticipated on the date the sheriff received this request for information. Furthermore, we find that the remaining submitted information is related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude that the remaining submitted information may be withheld from disclosure pursuant to section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, responsive information to which all of the parties in the anticipated litigation have had access is not

excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the arrest warrant we have marked must be released in accordance with article 15.26 of the Code of Criminal Procedure. The sheriff must release section one of the custodial death report, and must withhold the remainder of the report, including the attachments found in Tab 4, pursuant to article 49.18(b) of the Code of Criminal Procedure. The requestor has a right of access to the marked fingerprint information under section 560.002 of the Government Code. The sheriff must withhold a portion of the submitted information that is subject to section 552.022(a)(1) pursuant to section 552.101 in conjunction with section 261.201 of the Family Code. Furthermore, to the extent that the information subject to section 552.022 includes CHRI, the sheriff must withhold that information pursuant to section 552.101. The remaining information subject to section 552.022 must be released to the requestor. The information not subject to section 552.022 may be withheld under section 552.103, to the extent it has not been seen by all other parties to the anticipated litigation.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free,

at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 209973

Enc. Submitted documents

c: Mr. Bob Bowland
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